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90-227

Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HARBHAJAN SINGH ATWAL

Petitioner

vs.

CITY OF RIVERSIDE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT, FOURTH DISTRICT, DIVISION TWO, FOR THE CITIES OF RIVERSIDE, SAN BERNARDINO, ETC., CA.

"WRIT OF CERTIORARI AND APPENDIX"

HARBHAJAN SINGH ATWAL
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QUESTION PRESENTED

THE ISSUE TO BE DECIDED CONCERNS THE PROPER BASIS FOR CIVIL CAUSE OF ACTION WHICH WAS INITIATED WITHIN THREE YEARS ACCORDING TO CCP 338 FOR LIABILITY CREATED BY STATUTE, i.e. VIOLATION OF CALIFORNIA CONSTITUTION AS WELL AS UNITED STATES CONSTITUTION; VIOLATION OF TITLE VII OF CIVIL RIGHTS ACT; LABOR CODE, SECTIONS: 132(a), 6310 - 6312; AND WORKER'S COMPENSATION LAW: 20,075, ETC.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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Petitioner

vs.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT, FOURTH DISTRICT, DIVISION TWO, FOR THE CITIES OF RIVERSIDE, SAN BERNARDINO, ETC., CA.

Now comes Petitioner/Appellant Harbhajan Singh Atwal and prays that a writ of certiorari issue to review the judgement of the Superior Court, County of Riverside, entered in this cause on February 8, 1989, affirmed by the Appellate Court, Fourth District, Division Two, San Bernardino, on

February 13, 1990, rehearing denied by the California Court of Appeals, Fourth District, Division Two on March 7, 1990, order denying review by the California Supreme Court entered on May 2, 1990.

OPINIONS BELOW

The opinion of the Superior Court of Riverside is unreported, and is appended below as Appendix A; the opinion of the Appellate Court, Fourth District, Division Two is unreported, and is appended below as Appendix B; the order of the Court of Appeals denying rehearing is unreported and appended below as Appendix C; the order of the California Supreme Court denying review is unreported as yet and appended as Appendix D.

STATEMENT OF JURISDICTION

The Superior Court of Riverside entered judgement on February 8, 1989.

The Court of Appeals, Fourth District, Division Two entered judgement on February 13, 1990. The California Court of Appeals, Fourth District, Division Two entered judgement on March 7, 1990. The California Supreme Court entered judgement on May 2, 1990. This court's jurisdiction is invoked under the U. S. Constitution, Amendments: I,V,VIII,XIII & XIV and violation of Civil Rights Act (1964) (42 USCS #2000e - 17).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III of the United States Constitution provides, in pertinent part:

"1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . .

"2. The judicial Power shall extend to all cases, in Law and Equity, aris-

ing under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . . .

" . . . . The supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make."

The First Amendment to the United States Constitution provides, in pertinent part:

———"Congress shall make no law respecting an establishment of religion or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides, in pertinent part:

"No person shall . . . be

compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law . . . ."

The Eighth Amendment to the United States Constitution provides, in pertinent part:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Thirteenth Amendment to the United States Constitution provides, in pertinent part:

"Neither slavery nor involuntary servitude shall exist within the United States or any place subject to their jurisdiction."

The Fourteenth Amendment to the United States Constitution provides, in

pertinent part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdictions the equal protection of the laws."

Title VII of the Civil Rights Act to the United States Constitution provides, in pertinent part:

> "Equal Employment Opportunity"; [non] "Discrimination because of Race, Color, Religion, Sex or National Origin"; "Prevention of Unlawful Employment Practices".

The Due Process and Equal Protection clauses protect people against de-

privation of life, liberty, and property, which are applicable to the State Government through the 14th Amendment and to the Federal Government through the 5th Amendment.

STATEMENT OF THE CASE

Applicant, of Oriental descent, began his employment as a meter reader with the City of Riverside on October 27, 1980. On April 19, 1983, Applicant was digging dirt from around a water meter box when he was attacked by two loose dogs. In order to prevent being bitten by the dogs, he fell and injured his lower back, while working within the course and scope of his employment.

Applicant and his treating physician requested numerous times, over a six-month period, in writing as well as verbally, that his employer, City of Riverside, provide a light-duty position (one not requiring bending, lifting, or

stooping) to expedite recovery of the injured area, but to no avail.

In March, 1984, Applicant was given work as a file clerk, supposedly until a permanent position would be arranged and provided. On or about April 16, 1984, Applicant, through an attorney, filed a claim with the Worker's Compensation Appeals Board (WCAB). On receiving the Summons of Service, Defendant's representatives became very angry and threatened the Applicant on several occasions.

On May 3, 1984, Applicant's treating physician issued a work limitation letter stating: "back to work, no bending, lifting or stooping." Subsequently, on or about May 17, 1984, a medical specialist, Dr. Kornblum, also issued a work restriction letter to Applicant. Defendant's representatives refused to comply with the restriction letters and insisted that Applicant should perform the regular duties,

irregardless. On or about May 25, 1984, the Director of Public Utilities sent a termination letter to the Applicant in violation of Administrative Manual, items 7 (a) and 15 which required the City to provide a modified or light position to an injured employee. The actions of the Defendant's representatives were invidious and showed a use of willful misconduct in aggravating the Applicant's injury by providing unsafe working conditions and unauthorized work practices which failed to protect the injury from further aggravation and, eventually, wrongful discharge. Applicant has, thereafter, suffered irreparable injury, as pain and suffering of physical and mental anguish is constant and will be sustained for the rest of his life. Thereby, Defendant's conduct violated the statute, A "liability created by statute" is a liability which would not exist but for the statute. Loren-

zetti v. American Trust Co. (1942) 45 F Supp 128; Abram v. San Joaquin Cotton Oil Co. (1942) 46 F Supp 969.

REASONS FOR GRANTING THE WRIT

I

The Code of Civil Procedure, CCP 338 (wrong to property or rights) expresses statutory authority for statutory liability within three years which provides, in pertinent part:

WITHIN THREE YEARS:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have

accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake, etc.

According to CCP338.1: An action for civil penalties or punitive damages authorized under Chapter 6.5 (commencing with Section 25100), Chapter 6.7 (commencing with Section 25280), or Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code shall be commenced within five years after the discovery by the agency bringing the action of the facts constituting the grounds for commencing the action.

Section's provision that actions on liability created by statute must be brought within three years is applicable to action under Federal Civil Rights Act creating cause of action against person subjecting another to deprivation of any constitutional rights under "color of law." Beauregard v. Wingard (1964) 230 F Supp 167.

Action against city police chief, under Federal Civil Rights Act was governed by subd 1 of this section; and act was not barred by provisions of Tort Claims Act (Gov C # 825, 911.2, 950.2). Ney v. California (1971) 439 F2d 1285.

This statute prescribes period of limitations in action for civil conspiracy under Federal Civil Rights Act. Lambert v. Conrad (1962) 308 F 2d 571.

CALIFORNIA CONSTITUTIONAL PROVISIONS

Section One of Article One to the California Constitution provides in pertinent part:

> "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Section Seven (a) of Article One to the California Constitution provides, in pertinent part:

> "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws;"

Section Eight of Article One to the California Constitution provides, in pertinent part:

> "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national origin or ethnic origin."

Section One of Article Three to the California Constitution provides, in pertinent part:

> "The State of California is an inseparable part of the United States of America, and the

United States Constitution is the supreme law of the land.

The conduct of the Defendant's representatives was invidious and was a use of willful misconduct to deprive the Applicant of his life, liberty, and property without the due process and equal protection clauses of law, by violating the California Constitution (Article 1-1, 1-7, 1-8 and Article 3-1), as well as United States Constitution (Amendments I, V, VIII, XIII, XIV, etc.).

The due process and equal protection clauses of the United States Constitution protect people against deprivation of life, liberty, and property which are applicable to the State Government through the 14th Amendment and to the Federal Government through the 5th Amendment.

Liberty by its definition includes at least the right to contract and engage in gainful employment. When a gov-

ernment act so injures a person's reputation that he will have lost significant employment or associational opportunities, there is loss of liberty. Property by its definition requires more than an abstract need or desire for the benefits (e.g. public education, welfare benefits, and to continue public employment may constitute property interest). Thereby a civil suit is maintainable in violation of California, as well as, U. S. Constitution by CCP338.

II

VIOLATION OF CIVIL RIGHTS ACT

It shall be an unlawful employment practice for an employer to discriminate against any of his employees (42 USCS #2000e-3), because he has opposed any practice made an unlawful employment practice by this title or because he has made a charge testified, assisted, or participated in any manner in an investigation,

proceeding, or hearing under this title (42 USCS # 2000e - 2000e-17). This title prohibits an employer from discharging an individual because of race, color, religion, sex, or national origin (42 USCS 2000e -2). Note other Federal statutes also grant certain employees a measure of civil rights protection. See e.g. 42 USC 1981, the Civil Rights Act of 1866 (covers both state and private acts of discrimination based on race and arguably national origin) 42 USC 1983, the Civil Rights Act of 1871 covers discrimination based on race, color, sex, national origin, religion, and other grounds when there is action under color of state law). (July 2, 1964, P. L. 88-352, Title VII, #704, 78 Stat. 257; Mar. 24, 1972, P. L. 92-261, # 8(c), 86 Stat 109.)

Cal. App. 1 Dist. 1989. (Master & Servant, Key-36, 31 Cal D 2d-96) expresses former employee's state causes of ac-

tion alleging wrongful discharge were preempted by federal law, where terms and conditions of his employment were governed by a collective bargaining agreement, and he did not enter into a separate, independent employment agreement with employer, moreover, his complaint regarding termination could only be handled through the grievance procedures set out in the collective bargaining agreement. (Labor Management Relations Act, 1947, #301, 29 U.S.C.A. #185., Abreu v. Svenhard's Swedish Bakery, 257 Cal. Rptr. 26, 208 C.A. 3d 1446.

III

PREEMPTION OF COMMON LAW RIGHTS BY STATE LAWS

(A) WORKER'S COMPENSATION LAW 20.075 PROVIDES WHERE PERTINENT:

California's worker's compensation law provides the exclusive remedy for injuries to employees arising out of and in the course of employment. Courts have

allowed suits for injuries resulting from fraudulent misrepresentation and defamation the grounds that such injuries aren't compensable under the worker's compensation law. The California Supreme Court allowed a suit for damages from arsenic poisoning in the workplace because the exclusive remedy provision does not apply where the employee's injury and its connection to employment. Some courts have ruled that the law's exclusive remedy doesn't apply to claim for intentional infliction of emotional distress.

Cal. App. 1 Dist. 1988. (Master & Servant, Key-39(1), 31 Cal D 2d-97). Tort cause of action for wrongful discharge based upon public policy is stated where former employee pleads employer's policy to contravene statutory proscription affecting matters relating to employer's business, employee's protest to company management regarding unlawful policy,

and retaliatory termination of employment resulting from protest. Hejmadi v. AMFAC, Inc., 249 Cal. Rptr. 5, 202 CA. 3d 525.

C.A. 9 (Cal.) 1988. (Master & Servant, Key-41(2), 31 Cal D 2d-102). Fact that jury found that former employee's breach of contract claim against former employer was barred by workers' compensation settlement did not preclude award of damages for lost wages and fringe benefits for former employer's breach of covenant of good faith and fair dealing. West's Ann. Cal. Labor Code # 3201 et seq., 3602 (a). Ortiz v. Bank of America Nat. Trust and Sav. Assn., 852 F. 2d 383.

(B) MAINTENANCE OF CIVIL SUIT (COMMON LAW), VIOLATION OF LABOR CODE SECTIONS 6310 - 6312:

A civil action is maintainable on the basis of deprivation of legal right, right was established at common law or by statute before the new statutory remedy was created, the statutory remedy is usu-

ally regarded as merely cumulative and older remedy may pursue at the Plaintiff's election. (Citations.) (2 Witkin, Cal. Procedure (2d ed. 1970) Actions, 8, p.886). Where a new right, one not existing at common law, is created by statute and a statutory remedy for the infringement thereof is provided, such remedy is exclusive of all others. (Citations.) (Orloff v. Los Angeles Turf Club (1947) 30 Cal. 2d 110, 112 (180 P. 2d 321, 171 A.L.R. 913).

Cal. App. 4 Dist. 1987. (Master & Servant, Key-30 (6.15), 31 Cal D 2d-93) State's Occupational Safety and Health Act did not require terminated employee to point to violation by employer of specific statutory enactment or rule in order to bring action based upon wrongful termination for employee's refusal to work in hospital under certain working conditions, as employee alleged that conditions endangered patients' health care and safety, but state

OSHA dealt with employee health and safety. West's Ann. Cal. Labor Code # 6300 et seq., 6310, 6311,Dabbs v. Cardiopulmonary Management Services, 234 Cal. Rptr. 129, 188 C.A. 3d 1437.

According to Hentzel v. Singer Co. 138 Cal. App. 3d 290; 188 Cal. Rptr. 159 (Dec. 1982), question arises, therefore, as to the impact of these sections (6310 - 6312) upon an employee's common law cause of action for retaliatory dismissal. Siner, citing judicial interpretation of the federal OSHA (29 U.S.C. # 651 et seq.), argues that Hentzel's rights are now limited to the filing of a complaint with the Labor Commissioner under section 6312. Hentzel, on the other hand, argues that his common law rights survive sections 6310 and 6312, and the Division of Labor Standards Enforcement has filed an amicus curiae brief in support of Hentzel's position. While the question is a difficult

one, we conclude upon analysis that the position taken by Hentzel and the division is correct.

Hentzel's complaint does not depend upon a private right of action implied by OSHA, but upon a right of action which existed independent of OSHA and which, the court concluded, the Legislature did not intend to destroy. Where a statute creates a right that did not exist at common law, and provides a comprehensive system of administrative enforcement, A requirement that administrative remedies be exhausted may be implied. (Flores v. Los Angeles Turf Club (1961) 55 Cal. 2d 736, 746 - 747 (13 Cal. Rptr. 201, 361 P. 2d 921).) But, generally, "where a statutory remedy is provided for the enforcement of a pre-existing commonlaw right, the newer statutory remedy will be considered only cumulative." (Id., at p. 747; see also, Jewett v. City Transfer & Storage Co.

(1933) 128 Cal. App. 556, 559 (18 P. 2d 351); Estate of Ward (1932) 127 Cal. App. 347, 354 (15 P. 2d 901); cf. Orloff v. Los Angeles Turf Club (1951) 36 Cal. 2d 734 (227 p. 2d 449).)

In fact, Applicant's liberty and property has been taken away and he has been permanently disabled (irreparably)for the rest of his life by the serious and willful misconduct of the Defendants. Thereby, his common law rights predated statutory rights, and the statutory right is merely cumulative. (138 Cal 3d at 300). Therefore, a civil cause of action is maintainable despite a Plaintiff's failure to adhere to procedural prerequisites of Labor Code 6312 and the failure to exhaust the available administrative remedies. (138 CA 3rd at 303).

Labor Code sections 6312 does not constitute a comprehensive system of administrative enforcement; indeed, it pro-

vides for no administrative remedy, other than the maintenance by an administrative agency of a lawsuit on behalf of the complaining employee. The court does not find in its provisions, or elsewhere in OSHA, an intent on the part of the Legislature to preclude an employee from suing on his own behalf. Moreover, unlike section 6311, which expressly conditions the right to relief upon notification to the employer within 10 days and the filing of a claim with the Labor Commissioner within 30 days, section 6312 contains no requirement for exhaustion.

The remedial scheme under section 6312 is distinguishable from that under the California Fair Employment and Housing Act (Gov. Code, # 12900 et seq.), where exhaustion of remedies in a similar situation may well be required. (Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 323 - 324, fn. 13 (171 Cal. Rptr.917).)

Also, the remedial scheme under section 6312 is similarly distinguishable from Labor Code section 132(a), which prohibits discrimination against an employee for filing or making known his intention to file an application for benefits with the Workers' Compensation Appeals Board.

Master & Servant, Key 39(1), 31 Cal D 2d-97 provides, in pertinent part:

N.D. Cal. 1988. Petition which alleged that employee was denied opportunity to be considered for another position with employer, that he was denied his yearly bonus, and that his last paycheck was delayed, because he filed age discrimination and wrongful discharge suit against employer, was sufficient to establish damage element of employee's retaliation claim. Harlan v. Sohio Petroleum Co., 677 F. Supp. 1021.

D.C. Cal. 1984. Claim that employees were fired as part of "deliberate nationwide purge of long-term employees"

in order to deprive them of pension benefits which would necessarily have accrued to them in the future was a properly pleaded claim under section providing that it shall be unlawful to discharge, fine, suspend, expel, discipline, or discriminate against participant or beneficiary for purpose of interfering with attainment of any right to which participant may be entitled under pension plan. Employee Retirement Income Security Act of 1974, # 510, 29 U.S. C.A. # 1140. Grywczynski v. Shasta Beverages, Inc., 606 F. Supp. 61.

Cal. 1988. Allegation of breach of written "termination guidelines" implying self-imposed limitations on employer's power to discharge at will may be sufficient to state cause of action for breach of employment contract. West's Ann. Cal. Labor Code # 2922. Foley v. Interactive Data Corp., 765 P. 2d 373, 254 Cal. Rptr. 211, 47 C. 3d 654.

IV

WRONGFUL DISCHARGE, VIOLATION OF LABOR CODE 132(a)

The refusal of Applicant's employer to restrict his duties resulted in an aggravation of the injury which violates Safety and Health regulations:

> "Whenever an employer engages in certain discriminatory practices with injured workers, it violates public policy and is guilty of a misdemeanor . . . . . .
>
> Liability under Labor Code Sections 132(a) is not limited to discrimination for the foregoing reasons; an employer is guilty of violating that section whenever an employee is penalized for being injured on the job or for losing time from work because of injury."

In an action for wrongful discharge in violation of Labor Code 132(a) which, at the time of the employee's discharge made it a misdemeanor for an employer to discharge an employee for filing a

worker's compensation claim, Plaintiff's remedies were not limited to those set forth in 132(a) as amended in 1978 and 1982, thereby requiring reversal as to the damages awarded for emotional distress and as punitive damages. A prior appeal, which was the law of the case, held that damages for discriminatory discharge (violation of Labor Code), misrepresentation, defamation and emotional distress were not provided under the worker's compensation statutes, thus, Applicant's remedies were not limited by 132(a) as in effect in 1974. The 1978 amendment providing new remedies to a discharged employee, and the 1982 amendment, setting a limit on the amount of increased compensation to which the employee would be entitled, were clearly substantive in nature and could not be applied retrospectively absent a clear showing of legislative intent for such application. Master & Servant, Key-10½, 31 Cal D 2d-85; West's Ann.

Cal. Labor Code # 132(a), 4453.5, Meyer v. Byron Jackson Inc. (1984, 2d Dist.) 161 Cal App 3d 402, 207 Cal. Rptr. 663.

Subject to circumstances which indicate a legislative intent to the contrary, the law in force at the time of the injury is taken as the measure of an injured person's right of recovery in worker's compensation. Hence, statutory change in worker's compensation which is "substantive in character", i.e., that which enlarges or diminishes the employee's existing rights and the employer's corresponding obligations, does not act retrospectively absent a clear showing of legislative intent that it should do so. In an action for wrongful discharge in violation of Labor Code 132(a), which at the time of the employee's discharge, made it a misdemeanor for an employer who retaliatorily discharges an employee for filing a worker's compensation claim or provides unsafe work conditions.

There was substantial evidence to support a finding of malice--that the employer acted in conscious disregard and serious and willful misconduct of Applicant's rights when it discharged him--and thus to support a verdict for punitive damages.

S.D. Cal. 1986 (Master & Servant Key-41(5), 31 Cal D 2d-102). Employee, in wrongful discharge action, could claim punitive damages where he alleged malice with sufficient particularity. West's Ann. Cal. Civ. Code # 3294; Fed. Rules Civ. Proc. Rule 9(b), 28 U.S.C.A., Clement v. American Greetings Corp., 636 F. Supp. 1326.

The intervening change in law is the case of Portillo v. G. T. Price Product Inc. (1982) 131 Cal. App. 3d 285, 290 (182 Cal. Rptr. 291), in which court held Labor Code section 132(a) was the exclusive remedy available to employee upon her claim of wrongful discharge because of her filing a worker's compensation claim for injury.

The Meyer 1 conclusion that in the absence of a full remedy by the statute, Meyer could seek relief by civil action remains unchanged by the later Portillo case based on a later statute. The court finds no harsh or inequitable result from the application of the law of the Meyer case to his action and allows him for all the generally available relief to make him whole to recover by civil cause of action. The present Applicant action is properly governed by the law of the case set forth in Meyer 1, despite changing concepts of tort law and public policy.

V

IMPACT OF GOVERNMENT CODE SECTIONS: 911.4 & 950.4

Applicant was under the impression that his worker's compensation attorney had been representing him in a civil action as he relied on that attorney to protect his rights relating to any claim against

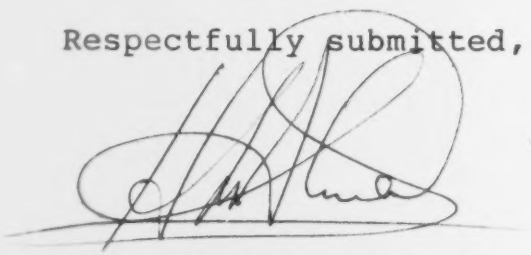
Defendant arising from his personal injury and wrongful discharge. However, in March, 1987, WCAB attorney informed Applicant that the statute of limitations would run in June of 1987 on any civil claim he had against Defendant. Thereupon, first, on April 25, 1987, and then on March 20, 1990, Plaintiff filed a complaint (of Aggravated Injury and Wrongful Discharge due to Unauthorized Practices) with the City Clerk, to the Mayor and City Council of the City of Riverside.

Pursuant to sections 911.4 and 950.4, which permits an Applicant to present a late claim, if it was through mistake, inadvertence, surprise, or excusable neglect, Applicant complied forthwith, after learning about these sections, but to no avail because City Council did not take any action on the complaint, on advice of City Attorneys.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the State Court,and remand the cause for proceedings consistent with this Court's opinion. Petitioner also prays that he be awarded with all reliefs requested in complaint and such other reliefs that this Court deems just, fair, equitable, and proper.

Respectfully submitted,



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APPENDIX

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Filed on Feb. 15,1989
Riverside County

IN THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE

HARBHAJAN SINGH ATWAL,

Plaintiff,

vs.

CITY OF RIVERSIDE,
a municipal corporation,

Defendant.

No. 107379. Order on Demurrer

The demurrer of defendant City of Riverside to the complaint of plaintiff Harbhajan Singh Atwal on file herein came on regularly for hearing by the Court on February 8, 1989.

Kathleen M. Gonzales appeared as counsel for defendant City of Riverside and Harbhajan Singh Atwal appeared in propria persona. After hearing, the Court, having read and considered the supporting and opposing points and authorities and having heard and considered the arguments of the parties, and good cause appearing therefor, made the following order:

IT IS ORDERED that defendant's demurrer be sustained without leave to amend on the grounds that the complaint does not state facts sufficient to constitute a cause of action in that the amended complaint alleges plaintiff's employment termination in May, 1984 and alleges the filing of a "complaint" with the City Clerk in April, 1987. The claim was not timely filed and cannot be amended to so claim.

Dated: February 10, 1989

/s/ Gordon R. Burkhart

Superior Court Judge

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

Filed on Feb. 13,1990
Court of Appeal

HARBHAJAN SINGH ATWAL,

Plaintiff and Appellant,

v.

CITY OF RIVERSIDE,

Defendant and Respondent.

E006557, Super. Ct. No. 187379

OPINION

APPEAL from the Superior Court of Riverside County. Gordon R. Burkhart, Judge. Affirmed.

Harbhajan Singh Atwal, in pro. per., for Plaintiff and Appellant.

John Woodhead, City Attorney, Norman Y. Herring, Chief Assistant City Attorney, and Kathleen M. Gonzales, Assistant City Attorney, for Defendant and Respondent.

Plaintiff Harbhajan Singh Atwal ap-

peals from the judgment dismissing his civil action against defendant City of Riverside after the trial court sustained defendant's demurrer without leave to amend. The demurrer was sustained following plaintiff's failure to file a claim with defendant city for almost three years following his termination from employment. We affirm.

FACTS

Plaintiff began his employment as a meter reader with the City of Riverside on August 27, 1980. On April 19, 1983, plaintiff was digging dirt from around a water meter box when he was attacked by two loose dogs. As plaintiff tried to keep from being bitten by the dogs he fell and injured his lower back.

According to the complaint subsequently filed by plaintiff, plaintiff's supervisors failed to place plaintiff on light duty as directed by plaintiff's doctors, with the result that plaintiff's symptoms

became worse. About seven months after the accident plaintiff suffered further injury in the course of physical therapy treatment for the original injury.

In March of 1984 plaintiff was given temporary work as a file clerk, but by May of 1984 was reassigned to his regular duties. The reassignment followed an evaluation by a doctor who stated that plaintiff was able to resume his normal duties.

In April of 1984 plaintiff, through an attorney, filed a claim with the Workers' Compensation Appeals Board (WCAB).

In May of 1984 plaintiff received a letter, signed by the Public Utilities Director of the City of Riverside, terminating plaintiff's employment as of June 1984. The employee separation form completed at that time indicated that the termination was based on plaintiff's inability to work due to his industrial back injury.

Following plaintiff's termination,

plaintiff's attorney filed a discriminatory termination claim with the WCAB contending that defendant had discriminated against plaintiff in violation of Labor Code section 132(a).[1/] After a hearing which was eventually held in May of 1988, that claim was denied on the grounds that at the time plaintiff was reassigned the evidence supported a finding that there was a good-faith medical assessment by the employer that plaintiff was able to return to work. The workers' compensation judge in that matter also found that plaintiff had failed to meet his burden of showing that defendant had departed from its normal practice in failing to provide light work for plaintiff once it became apparent that plaintiff would be unable to continue his work as a meter reader. The record does not indicate that plaintiff sought review of the decision of the workers' compensation judge.

1/ Labor Code section 132a prohibits discrimination against workers who are injured in the course and scope of their employment.

Less than five months after plaintiff's termination a decision was issued by the California Unemployment Insurance Appeals Board determining that plaintiff was "not presently capable of doing even relatively light work" because of his disability, and thus was not entitled to unemployment insurance. The judge did note in the decision, however, that plaintiff had filed a disability insurance claim under which he was to receive benefits.

In March of 1987 the attorney who was handling plaintiff's WCAB claim informed plaintiff that the statute of limitations would run in June of 1987 on any civil claim against the defendant for wrongful termination. Plaintiff alleged that he had relied on that attorney to protect his rights regarding any claim against defendant.

In April of 1987 plaintiff sent a letter to the mayor and city council of the

City of Riverside in which he outlined the history of his termination and asked for reinstatement and back pay.

In May of 1987 plaintiff, acting without an attorney, filed the civil action against defendant which is the basis of this appeal. In his amended complaint plaintiff charged defendant with wrongful termination; violation of provisions of the Labor Code and Health and Safety Code; intentional infliction of emotional distress; and breach of public policy and wrongful termination.

Defendant demurred to the complaint on the grounds that plaintiff had failed to allege the timely filing of a claim against the city prior to the filing of the complaint; that the Worker's Compensation Appeals Board had exclusive jurisdiction of the subject matter; and that the complaint failed to allege exhaustion of administrative remedies.

At a brief hearing in February of 1989, the court sustained the demurrer of defendant without leave to amend because of plaintiff's failure to file a timely claim against the defendant city. The judgment of dismissal was subsequently entered. Plaintiff now appeals.

DISCUSSION

On appeal, plaintiff, still acting without counsel, appears to argue that the filing of the claim with the City of Riverside was timely; that plaintiff may maintain a civil action even without filing a claim; and that the jurisdiction of the WCAB is not exclusive, but instead plaintiff may bring a superior court action based on violation of provisions of the Labor Code. We disagree with plaintiff and we affirm.

I. PLAINTIFF'S CLAIM WAS NOT TIMELY.

Plaintiff's brief on appeal indicates plaintiff's belief that either the letter

mailed to the mayor and city council of Riverside on April 25, 1987, constituted a timely claim under Government Code section 911.2, or, that if it was not timely, leave should and could be granted under Government Code section 911.4 to submit a late claim. Neither position is tenable.

Government Code section 905 provides that all claims for money or damages against local public entities must be submitted to those entities. Although it is not clear from plaintiff's complaint exactly what relief he sought, in his appellate brief he requests that he "be awarded all the reliefs requested in complaint (e.g., general, special and punitive damages, damages for impairment of past and future earning capacity, etc. . . .)." Since he seeks relief in the form of damages only, his complaint would come within the claim requirements of section 905.

Government Code section 911.2 provides that the claim required by Government Code

section 905 must be presented not later than one year after the cause of action accrues, or, in the case of death or injury, within 100 days. Government Code section 945.4 provides that the filing of such a claim is a prerequisite to bringing a suit for money or damages against a public entity.

The only document submitted by plaintiff which could be construed to meet the requirements of a government claim as set forth in Government Code section 910 was the letter mailed to the mayor and the city council of defendant City of Riverside. That letter was not mailed until April 25, 1987, almost three years after the termination complained of by plaintiff. While the three-year statute of limitations cited by plaintiff would have been applicable to plaintiff's cause of action, that statute did not set forth the time limits for filing a claim with the public entity.

Plaintiff argues generally that the court has the authority to relieve a party or his representative from an adverse decision taken against him through his mistake, inadvertence, surprise, or excusable neglect under Code of Civil Procedure section 473. Relief is not available to plaintiff under either that section or the late-claim provisions of Government Code sections 911.4 and 911.6. Under Code of Civil Procedure section 473, the petition for relief must be brought within six months of the judgment; under Government Code section 911.4, application for a late claim must be within one year of accrual of the cause of action accrued.

We find that the plaintiff did not present a timely claim to the defendant as is required by statute. Accordingly, plaintiff cannot now bring an action against the City of Riverside seeking to recover tort damages for wrongful termination of employ-

II. THE EXCLUSIVE REMEDY FOR VIOLATION OF THE PROVISIONS OF THE LABOR CODE LIES IN THE WORKERS' COMPENSATION PROCEEDING.

Plaintiff argues that he can properly bring a civil action against the defendant for violations of Labor Code section 132a notwithstanding the language of the statute which gives to the WCAB "full power, authority, and jurisdiction to try and determine finally all the matters specified in this section subject only to judicial review." (Lab. Code, # 132a.)

Plaintiff bases his contention on the decision in Meyer v. Byron Jackson, Inc. (1984) 161 Cal. App.3d 402. Review of that decision reveals, however, that the determination that the plaintiff could bring a civil action was based on an earlier appellate decision in the case which relied on the provisions of section 132a as they were written in 1972. The earlier decision had thus become the law of the case. In the 1984 opinion the court acknowledged

that the 1978 amendments to section 132a hAd broadened the remedies available in the workers' compensation proceedings and that under post-1978 decisions a civil action could not be maintained. (Id., at p. 409.)

"The Workers' Compensation Act has been frequently held to be the exclusive remedy in situations to which it applies. (See Continental Casualty Co. v. Superior Court (1987) 190 Cal. App. 3d 156, 161.)" (Pickrel v. General Telephone Co. (1988) 205 Cal. App. 3d 1058, 1063.) Thus, in Portillo v. G.T. Price Products, Inc. (1982) 131 Cal. App. 3d 285, a claim before the WCAB was held to be the exclusive remedy for a worker discharged in retaliation for exercise of workers' compensation rights. In Pickrel v. General Telephone Co., supra, the WCAB was held to have exclusive jurisdiction over a claim under Labor Code section 132a for discrimi-

nation on the basis of physical disability based on an industrial injury. (205 Cal. App. 3d at p. 1064.)

We find plaintiff's claims under Labor Code section 132a to be within the exclusive jurisdiction of the WCAB and not amenable to suit in superior court.

III. PLAINTIFF CANNOT BRING SUIT UNDER OTHER PROVISIONS OF THE LABOR CODE.

Plaintiff also discussed claims under Labor Code sections 6310, 6311 and 6312. Those statutes prohibit retaliation against an employee for filing a complaint regarding unsafe working conditions; prohibit retaliation against an employee for refusal to work in violation of an occupational safety or health standard; and authorize the filing by the employee of a discrimination complaint with the Labor Commissioner.

These code sections were not raised by plaintiff in the trial court and the argument supporting the claim of violation is not well developed on appeal. Plaintiff

cites the decision in Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, in support of his argument that a civil action may be brought for violation of those sections. In Hentzel, plaintiff was permitted to bring a civil action against his employer following his termination in retaliation for his protests against what he considered to be hazardous working conditions, i.e., not being provided with a smoke-free environment on his job. (Id., at p. 293.)

Plaintiff here has not made a factual showing that he comes within the terms of the statutes. He has not alleged that his termination was in retaliation for complaining about or refusing to work in violation of health or safety standards. Sections 6310 through 6312 of the Labor Code are intended to protect employees generally from unsafe working conditions or work practices by protecting employees who challenge such practices. Plaintiff here alleges wrongful

termination, but not on the basis of unsafe working conditions.

Because we conclude that the allegations of plaintiff's complaint do not bring him within the terms of Labor Code sections 6310 through 6312, we need not decide whether plaintiff would be able to allege an independent cause of action under these sections, or whether plaintiff would be required to file a claim with defendant as a prerequisite to filing such an action.

We hold that plaintiff has failed to state a cause of action for violation of the cited provisions of the Labor Code.

A review of the entire record has not revealed error by the trial court which would entitle plaintiff to relief. Plaintiff is understandably frustrated by the conflicting findings of the administrative bodies which have dealt with his case. At the time he was fired, plaintiff was found able to work; when he applied for unemploy-

ment insurance, however, he was ineligible because of his disability.

It is not clear from plaintiff's documents the theory under which he seeks to recover damages. If he was able to work at the time he was terminated, then his failure to do the work was a basis for his termination. If he was in fact unable to work at the time he was terminated, then he was entitled to Workers' Compensation benefits which he has apparently received. We are unable to grant relief beyond that which plaintiff has received.

DISPOSITION

The judgment appealed from is affirmed.

NOT FOR PUBLICATION

/s/ Hollenhorst
Acting P.J.

We concur:

/s/ McDaniel
J.

/s/ Dabney
J.

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

Division Two

Filed Mar 7, 1990
Court of Appeal
Fourth Dist.

ATWAL, HARBHAJAN SINGH
PLAINTIFF-APPELLANT
v.
CITY OF RIVERSIDE
DEFENDANT-RESPONDENT

E006557
Riverside County No. 187379

ORDER

THE COURT:

The petition for rehearing is denied.

/s/ Hollenhorst
Acting Presiding Justice

cc: Riverside County Clerk
ALL Counsel

O R D E R D E N Y I N G R E V I E W

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District,Division Two,
No. E006557
S014720
IN THE SUPREME COURT OF THE STATE OF CALIF.

I N B A N K

Supreme Court
FILED
May 2, 1990
Robert W. Clerk, Dep.

HARBHAJAN SINGH ATWAL, Appellant

v.

CITY OF RIVERSIDE, Respondent

Appellant's petition for review DENIED.

Lucas
Chief Justice